

**Letter of Findings Number: 04-20110626**  
**Use Tax**  
**For Tax Years 2008-2010**

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**ISSUE**

**I. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the assessment of use tax on certain purchases.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on some purchases it made during the tax years 2008 through 2010. The Department therefore issued proposed assessments for use tax and interest. Taxpayer protested the imposition of use tax on some of those purchases. An administrative hearing was held and this Letter of Findings results. Further facts will be provided as required.

**I. Use Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the Department's assessment of use tax on certain transactions during the audit years of 2008, 2009, and 2010. Taxpayer states that the transactions under protest are not subject to use tax since they were either payments for services or since sales tax was paid at the time of the transactions. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. The Department determined that Taxpayer purchased tangible personal property in retail transactions during the audit years but did not pay sales tax on the purchases. The Department therefore issued proposed assessments for Indiana use tax.

Taxpayer protests the imposition of use tax on some of the items which the Department determined were subject to use tax. The first category of items under protest involves rental of a piece of equipment at a rate of \$517.05 per month. Taxpayer states that sales tax was included in the rental amount it paid to its vendor. In the course of the protest process, Taxpayer provided documentation in support of its position. After review, this documentation does establish that sales tax was included in the payments it made to the vendor; therefore, Taxpayer has met the burden of proving the proposed use tax assessments wrong regarding this category.

The second category under protest concerns monthly payments of \$2,086.07 and \$760.00, which Taxpayer states had sales tax paid at the time of purchase. In support of this position, Taxpayer provided an invoice from the vendor which shows sales tax included in the total amount paid by Taxpayer. After a review of the invoice and of the audit report, the Department notes that, while the invoice offered in support of Taxpayer's position does show sales tax included, there are no entries in the audit report in the amount of that invoice and the monthly payments do not total the amount listed on the invoice provided by Taxpayer. The Department cannot assume that a vendor collected sales tax on every transaction, even if they did collect sales tax on the invoice provided by Taxpayer. Since Taxpayer was not able to provide invoices for the transactions listed on the audit report, Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

The third category under protest is for payments which Taxpayer states were for services and not for tangible

personal property. Taxpayer states that it paid for a service agreement from this particular vendor and that service was the only activity, without a transfer of tangible personal property. In support of this position, Taxpayer provided a copy of the service agreement. Unfortunately, the copy has apparently been faxed and copied several times and is not legible. While it is labeled as a "Service Agreement," the Department notes that a service agreement could contain an agreement to periodically replace parts or refill depletable reserves such as toner in a copier or coolant in a refrigeration system. Since the service agreement is illegible, it is not possible for the Department to determine to what Taxpayer and its vendor agreed. This document does not meet the requirement of proving the proposed assessment wrong, as required by IC § 6-8.1-5-1(c).

In conclusion, Taxpayer has provided sufficient documentation to establish that the rental with monthly payments of \$517.05 did have sales tax paid as part of the transaction. Payments to this vendor will be removed from the Department's use tax calculations. Taxpayer has not provided documentation regarding the second vendor which establishes that sales tax was included in the monthly payments. Taxpayer has not provided documentation regarding the service agreement which establishes the terms of that agreement. Thus, Taxpayer has not met the requirement of IC § 6-8.1-5-1(c) of proving the proposed assessments for use tax on transactions with the second vendor and on the service agreement wrong. Those amounts will remain in the Department's use tax calculations.

#### **FINDING**

Taxpayer's protest is sustained in part and denied in part, as described above.

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